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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 834

JOHN G. GILES AND JAMES V. GILES,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

On Appeal from the Court of Appeals of Maryland

MEMORANDUM *AMICUS CURIAE* OF THE NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION IN SUPPORT OF JURISDICTION

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Interest of the National Capital Area Civil Liberties Union

The National Capital Area Civil Liberties Union appears as *amicus curiae* pursuant to the written consent of both appellants and appellees, filed in accordance with Rule 42(1). *Amicus* is the affiliate of the American Civil Liberties Union for the Washington, D.C., metropolitan area, including Montgomery County, Maryland, where the trial and conviction of appellants took place.

It is a non-profit, non-partisan membership organization of over 1900 members, dedicated to protecting the rights guaranteed by the Constitution of the United States.

The Union appears here because of its conviction that the judgment of the Court below, unless reversed, will deprive appellants of their lives without due process of law, and will deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Facts

Amicus adopts the statement of facts in the appellants' Statement as to Jurisdiction, filed in this Court on February 15, 1963. It is understood that the facts are not in dispute at this time.

Question Presented

Whether appellants may constitutionally be sent to their deaths after a trial at which the jury determined the law as well as the facts, without any instruction whatever as to the law from the trial judge.

Argument

The purpose of this memorandum is simply to emphasize for the Court's attention a few notable features that in the opinion of *amicus* make this case an extraordinary one. Appellants' Statement as to Jurisdiction has thoroughly explored the legal issues, and this memorandum will not burden the Court by extensive repetition.

The issue at this stage, of course, is only whether the questions presented by appellants are so plainly insubstantial that this Court should summarily dismiss the case without hearing argument. There is no doubt that the federal questions were properly presented and passed on by the Court below. The opinion of that Court neces-

sarily holds: (1) that Article 15, § 5, of the Constitution of the State of Maryland does not violate the due-process and equal-protection clauses of the Fourteenth Amendment,[1] and (2) that those clauses are similarly not violated by a rule of law that allows the jury to determine the law applicable to a criminal case without instruction thereon from the judge. It might be argued that the second question is not properly here, on the ground that appellants' counsel did not at trial ask the judge to give any instructions. But this argument is groundless. The point presented by the Statement as to Jurisdiction, as we understand it, is the validity of a State law that permits a judge to omit the giving of instructions under *any* circumstances. That is, can the right to have instructions on the applicable law be waived? Whether due process requires that the jury in every criminal trial be instructed, as appellants argue, is plainly a question passed upon below and properly presented here.

In addition to the matters raised by the Jurisdictional Statement, *amicus* suggests the following considerations.

First. At bottom this case concerns the place of the rule of law in our society. It is a basic precept of our society that our Government is a Government of laws and not of men. Of course, as perceptive observers have many times pointed out, this precept states an ideal that can seldom be lived up to. But we are committed to the pursuit of the ideal, and no rule of law that effectively frustrates this pursuit can be allowed to stand.

With all respect to the right and duty of the sovereign State of Maryland to make rules pleasing to itself in the

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[1] Art. 15, § 5, is also indirectly involved in another case presently before this Court. The existence of this provision (though not necessarily its validity) is being urged on the Court by petitioner in Brady v. Maryland, No. 490, scheduled for argument on Monday, March 18, 1963. It provides: "In every criminal case, the jury shall be Judges of Law, as well as of fact."

field of criminal procedure, *amicus* is compelled to say that Article 15, § 5, of the Maryland Constitution exceeds the power of the State. For this section actively encourages juries to take into account irrational or irrelevant factors.[2] It allows, even invites them to adopt for each case a distinct rule of law. This power not only makes it impossible for a man to know what conduct of his will be within the law. It also fosters the probability, indeed, the virtual certainty, that a different law will apply to each individual defendant. Nothing could be in more fundamental opposition to the rule of law. Particularly is this true in this case, where the jury were not even given advisory instructions on the elements of the crime that they were asked to judge.

Second. In addition to the fundamental unfairness of the rule applied by Maryland in this case, there is an additional reason why *amicus* believes that that rule violates the Fourteenth Amendment. The State of Maryland has denied to these appellants one of the specific guarantees of the Bill of Rights—the ancient and valuable right of trial by jury. Both the Sixth Amendment and Article 3, § 2, of the Federal Constitution have been held to require that in a federal court a jury may not determine the law for itself. The meaning of "trial by jury," as that phrase was understood at common law, and as that phrase is used in the Constitution, necessarily includes government of the jury by the trial judge. A jury that is the judge of the law, in other words, is not that jury guaranteed by the Federal Constitution in federal courts. *Sparf* v. *United States*, 156 U.S. 51 (1894).

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[2] *Amicus* does not here raise as a separate issue the inadequacy of the *voir dire* examination permitted appellants on the existence of racial prejudice. But it does point out that the Maryland rule aggravates this inadequacy because it allows undetected prejudices to operate freely in a legal vacuum devoid of rules of law binding on the jurors.

Of course, the States are not required to adopt for themselves all of the details of federal procedure. But the right of trial by jury is not a detail. It is a fundamental guarantee of liberty, quite as important as the protection against unreasonable search and seizure that this Court has held applicable against the States in full. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Surely the right of trial by jury is important enough to be absorbed into the due-process clause of the Fourteenth Amendment. See generally Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961).[3]

Third. Nor may the State justify its practice by cloaking it in the protective garment of age. Even if mere age could justify a practice fundamentally unfair, this practice would not qualify.[4] It has never been the accepted practice to allow the jury to decide questions of law. It is true that the jury has traditionally possessed the power to render a general verdict of not guilty in defiance of the law. See *Bushell's Case*, Vaughan 135, 6 Howell's State Trials 999 (1683). That is, the Court may not in a criminal case direct a verdict in favor of the State. But to expand this doctrine into the theory that the jury, in the absence of instructions from the Court, has the right to determine the law according to its own whim, is a modern excrescence on the body of the common law. This legal heresy, long ago exploded by this Court in *Sparf* v. *United States*, *supra*, is not entitled to any of

[3] Maxwell v. Dow, 176 U.S. 581 (1900), is not to the contrary. That case held only that a State may employ a jury of less than 12. It cannot be read to approve the attribution to the jury of power to decide the law. If a jury is to have that power, litigants will be well advised to forego jury trial altogether and have their cases tried to the Court. Then, at least, consistent legal principles can be applied to the facts.

[4] It is noteworthy that only two States, Maryland and Indiana, cling to this practice. It is truly "an unsatisfactory remnant of an age gone by . . ." Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark, J., concurring).

the respect due to ancient rules of the common law. *Accord, e.g., People* v. *Bruner*, 343 Ill. 146, 175 N.E. 400 (1931).

Conclusion

Amicus respectfully submits that the questions presented in this case are substantial. The lives of these appellants and their constitutional rights are in the balance. The Court is requested to note probable jurisdiction of this appeal, and hear full argument on the merits.

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March 18, 1963

CERTIFICATE OF SERVICE

The undersigned counsel for *amicus curiae*, a member of the Bar of this Court, hereby certifies that on March 18, 1963, pursuant to Rule 33(1) of this Court, he served copies of this memorandum on counsel of record for appellants and appellee, respectively, by mailing them to counsel's post-office addresses, first-class postage prepaid.